Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

ROBERT DUPURTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Amendment and Fifth Amendment preclude a district court from increasing a defendant's Federal Sentencing Guideline range on the basis of the amount of loss and "aggravated role," when such facts are not specified in the indictment, not submitted to the jury as part of the court's instructions, nor found by the jury beyond a reasonable doubt, and are merely determined by the sentencing court afterwards, by a preponderance of the evidence?

LIST OF PARTIES

The parties in the proceeding below were Petitioner, and the four corporate entities (Numisgroup International Corp., Galerie Des Numismatique, Ltd., Numismatic Asset Strategies, Inc., and Meridian Numismatics, Inc.) and the respondent, United States of America.

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Petitioner Robert DuPurton respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Second Circuit, filed on May 21, 2004, which affirmed the judgment of the United States District Court, Eastern District of New York (Spatt, D.J.), entered on March 4, 2003, and amended and entered on March 6, 2004.

OPINION BELOW

The Order of the Court of Appeals appears in the appendix as 1a - 2a, and is officially reported at 368 F.3d 880. The Court of Appeals affirmed the judgment of the United States District Court, Eastern District of New York (Spatt, D.J.), convicting Petitioner Robert DuPurton, after a trial by jury, of conspiracy to commit mail fraud, mail fraud (21 counts) and wire fraud conspiracy, in violation of 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 1341 (mail fraud), and sentencing him, pursuant to the United States Sentencing Guidelines, to sixty-three months imprisonment, to be followed by a three year term of supervised release.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Court of Appeals Order sought to be reviewed was filed on May 21, 2004. This Petition for a Writ of Certiorari is filed within the time prescribed by U.S. Sup. Ct. Rule 13, 28 U.S.C.A.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * *."

STATEMENT OF THE CASE

Petitioner Robert DuPurton, and the four corporate entities (Numisgroup International Corp., Numismatic Asset Strategies, Inc., Galerie Des Numismatique, Ltd., and Meridian Numismatics, Inc.) were accused by a federal grand jury, sitting in the Eastern District of New York, of conspiracy to commit mail fraud, mail fraud, and wire fraud conspiracy, in connection with the retail sale of coins to collectors. Petitioner was the owner and president of the four corporate entities which, though related, maintained separate identities and functioned independently.

The government's case against Petitioner, and the four corporate entities, was based upon the testimony of thirty-nine witnesses, consisting of fourteen former employees (many of whom were testifying pursuant to plea agreements with the government), nineteen former customers, two expert witnesses on coin grading, and four postal employees.

The government also presented numerous documents, including copies of invoices reflecting sales of coins and other collectibles, to the testifying former customers, and a document (Government Exhibit 1300) which summarized the sales transactions according to the grades and prices assigned to the coins.

The defense in essence was that Petitioner, and the four corporate entities, did not intend to defraud any one, and that the government failed to prove that they did. To this end, the defense presented the testimony of two witnesses qualified by the District Court as experts in coin grading to refute the testimony of the government's expert witnesses, thereby negating the government's proof as to intent to defraud.

The key issue at trial concerned the grading and appraisal of collectible coins, being that coin grading and appraisal are entirely unregulated (unlike for example real estate appraisal), and that coin grading, and appraisal, are so *highly* subjective and that there is no commonly accepted standard for the grading and appraisal of coins. Not only are the multitude of grading standards inconsistent but, even within a particular standard itself, grading and appraisal were subject to inconsistent grades and appraisals.

After a jury trial of some two and one-half months, the jury found Petitioner guilty of conspiracy to commit mail fraud, mail fraud (21 counts), and wire fraud conspiracy.

Prior to sentencing, the United States Probation Office prepared a Pre-Sentence Report (PSR). According to the Probation Officer, the base offense level, using the 1998 guideline manual, was six, and the following Specific offense

characteristic was found: the loss attributable to Petitioner was more than $2,500,000.00 but less than $5,000,000.00, resulting in a thirteen level increase, pursuant to Guideline 2F1.1(b)(1)(N). Moreover, the Probation Officer found appropriate a four level upward adjustment for Petitioner's "Role in the Offense: As the [petitioner] was the organizer of criminal activity that involved five or more participants * * * Guideline 3B1.1(a)." This resulted in a four level increase.

At the sentencing, the government initially requested a hearing to determine the amount of loss attributable to Petitioner, arguing that at trial evidence was presented that the nineteen former customer-witnesses lost $1,376,424. In addition, the government represented that it had evidence that twenty-two other customers, who did not testify at trial, sustained losses attributable to Petitioner amounting to $497,395.50. The total loss attributable to Petitioner, according to the government, was $1,873,819.50.

Petitioner responded that a hearing was not necessary, being that he was familiar with the testimony the expert government witnesses would present on grade and value of the coins, having sat through that same testimony for several days at trial. Petitioner was not, however, conceding the reliability of the testimony or the expert's credibility; rather, by agreeing that a hearing was unnecessary to establish loss, "we're not contesting what the testimony would be."

Applying the 1998 sentencing guidelines, the District Court increased by twelve levels the Offense level for the amount of loss, and increased the offense level by another four levels because Petitioner was shown, to the District Court's satisfaction, to be a leader/organizer in the offense.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD REVIEW THIS CASE TO RESOLVE WHETHER THE SIXTH AMENDMENT AND FIFTH AMENDMENT BAR A COURT FROM SIGNIFICANTLY INCREASING A DEFENDANT'S FEDERAL SENTENCING GUIDELINE RANGE ON THE BASIS OF FACTS WHICH WERE NOT SPECIFIED IN THE INDICTMENT OR FOUND BY A JURY BUT MERELY FOUND BY THE DISTRICT COURT BY A PREPONDERANCE OF THE EVIDENCE.

Some thirty days after Defendant's convictions for conspiracy to commit mail and wire fraud, and several counts of mail fraud, were affirmed by the United States Court of Appeals for the Second Circuit, the Supreme Court, in *Blakely v Washington*, 124 S. Ct. 2531 (June 24, 2004), held that a defendant's Sixth Amendment right to a fair trial by jury was violated when the state court sentenced him to more than three years above the standard range for his offense, based on the state court's finding that the defendant acted with deliberate cruelty. Although *Blakely* did not address the federal sentencing guidelines, the reasoning underlying *Blakely* applies with equal force to the Federal Sentencing Guidelines, such that the Sixth Amendment precludes an increase in a federal defendant's guideline range on the basis of facts that were not specified in the indictment, that were not found by a jury beyond a reasonable doubt, or admitted by the defendant during a plea, and were merely found by the district court following a verdict or plea. Moreover, *Blakely* leaves open the question whether the Fifth Amendment constitutes an additional bar to such an increase, based upon facts not alleged in the indictment, and found only by a judge after conviction.

In the case at bar, Defendant objected to the upward adjustments cited by the Probation Department, and used by the district court, to increase significantly Defendant's sentencing range under the guidelines, *viz*: monetary loss attributed to the fraud (12 levels) and Defendant's role in the offense-an organizer involving five or more participants (4 levels), though not on *Blakely* Sixth Amendment grounds, or on Fifth Amendment grounds. And, although, the Supreme Court "[i]n the ordinary course * * * do[es] not decide questions neither raised nor resolved below" (*Glover v United States*, 531 U.S. 198, 205 [2001]), "the rule is prudential only" and not jurisdictional, insofar as cases arising in the federal courts (as opposed to the State courts) are concerned (*Yee v Escondido*, 503 U.S. 519, 533 [1992], citing *Carlson v Green*, 446 U.S. 14, 17 n.2 [1980]). As noted by the Court in *Carlson*,

> "Th[e] question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so * * *. Here, the issue is squarely presented and fully briefed. It is an important recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case. * * * We conclude that the interests of judicial administration will be served by addressing the issues on the merits." (446 U.S., at 17 n.2).

For good reason Defendant did not raise the *Blakely* issue before the District Court or the Court of Appeals. As noted by Justice O'Connor, dissenting in *Blakely*, "[p]rior to today,

only one court [a state court] had ever applied *Apprendi* to invalidate application of a guidelines scheme [citing cases]" (124 S. Ct., at 2547). More recently, in *Simpson v United States*, __F.3d__, 2004 WL 1636965, *2 (7th Cir. 2004), the Court of Appeals noted that "before *Blakely* was decided, every federal court of appeals had held that *Apprendi* did not apply to guideline calculations made within the statutory maximum."

Moreover, the law has recognized the harshness of refusing to consider a constitutional issue on direct appeal not known to counsel at the time of trial (*see United States v Hart*, 407 F.2d 1087, 1089 [2d Cir.], *cert. denied*, 395 U.S. 916 [1969]). In fact, the Second Circuit has recognized that *Apprendi* can be raised as plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure (*see United States v Doe*, 297 F.3d 76, 81-82 [2d Cir. 2002], *citing United States v Thomas*, 274 F.3d 655 [2d Cir. 2001] [*in banc*], and *United States v Cotton*, 122 S. Ct. 1781, 1785 [2002] [applying plain error review to failure to charge drug quantity in the indictment]). Significantly, in *United States v Randle*, 259 F.3d 319, 321 (5th Cir. 2001), *opn. w/drawn and superseded on rearg.*, 304 F.3d 373 (5th Cir. 2002), *cert denied*, 538 U.S. 962 (2003), the court noted that, for the first time in his certiorari petition, the defendant raised *Apprendi*, which had been decided the same day the defendant's convictions were affirmed. The Supreme Court remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Apprendi v New Jersey* * * * (*Randle v United States*, 531 U.S. 1136 [2001]). On remand, the Court of Appeals considered the *Apprendi* issues raised by the defendant, under the plain error doctrine.

In short, for the previously stated reasons, certiorari should be granted to review the important questions about the applicability of *Blakely v Washington* to the Federal Sentencing Guidelines.

Regarding *Blakely*, the circuit courts of appeal had unanimously agreed that, while *Apprendi v New Jersey*, 530 U.S. 466 (2000) precluded a court from sentencing a federal defendant to a term exceeding the statutory maximum of the charge specified in the indictment on the basis of facts not found beyond a reasonable doubt, *Apprendi* did not bar a court from increasing the defendant's guideline calculation on the basis of facts not charged or found by a jury. Stated another way, courts had assumed that *Apprendi* did not apply to sentence enhancements based upon guidelines calculations, so long as to the sentence remained within the statutory maximum. *Blakely* indicates that this assumption is wrong.

In *Blakely*, a Washington State defendant pled guilty to first degree kidnapping, a charge which subjected the defendant to a ten-year maximum sentence. Other provisions of state law indicated that "the standard range" for such an offense was 49-53 months, but allowed for enhancements if the sentencing court found certain aggravating factors. Under that provision, the sentencing court held a hearing and determined that the defendant had acted with "deliberate cruelty" -- one of the enumerated aggravating factors. Based on that determination, the court sentenced the defendant to a term of ninety months, which was thirty-seven months more than the "standard maximum" (*Blakely v Washington*, 124 S. Ct., at 2535). On appeal, the defendant argued that "this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence"

(*id.*, at 2536). The State Court of Appeals affirmed, and the Washington Supreme Court denied discretionary review (*id.*, at 25365). The Supreme Court granted certiorari to consider whether the sentencing procedure violated Blakely's Sixth Amendment right to a trial by jury (*id.*, at 2534, 2536).

At the outset of its discussion, the Court flatly stated that,

> "[t]his case requires us to apply the rule we expressed in *Apprendi v New Jersey* * * *, 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*id.*, at 2536).

In perhaps the key passage of the decision, the *Blakely* majority clarified what was meant by "statutory maximum", declaring that:

> "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* [citing cases]. In other words, the relevant 'statutory maximum' is not the sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the

> punishment' [citation omitted], and the judge exceeds his proper authority" (*id.*, at 2537).

Since the sentencing court could not have imposed the exceptional ninety-month sentence solely on the basis of facts admitted in the guilty plea, the *Blakely* majority reasoned that the "maximum sentence" for *Apprendi* purposes was not truly ten years, but the "standard range of forty-nine to fifty-three months" (*id.*, at 2537-39). Consequently, "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, the [defendant's] sentence was invalid" (*id.*, at 2538).

As further justification for this result, the *Blakely* majority explained that "jury trial is meant to ensure [the people's] control in the judiciary" (*id.*, at 2539) and that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict" (*id.*).

The majority further argued that "[t]hose who would reject *Apprendi* are resigned to one of two alternatives" (*id.*). The first alternative is that the jury need only find those facts the legislature happens to designate "elements of the crime" and that any other "sentencing factors" may be found by a judge "no matter how much they may increase the punishment:" (*id.*). The problem with this alternative is that, "[t]he jury could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish" (*id.*; emphasis in original).

The second alternative is to permit sentencing factors within limits, i.e., until the sentencing factor becomes a "'tail which wags the dog of the substantive offense'" (*id.*). But this alternative was unacceptable, the majority concluded, because it was unduly subjective (*id.*, at 2539-40).

In addition, the *Blakely* majority rejected one dissenter's argument that, because determinate sentencing schemes involve less judicial discretion than indeterminate sentencing schemes, the constitutionality of the latter implies the constitutionality of the former (*id.*, at 2540). But this argument is flawed because "the Sixth Amendment by its terms is not a limitation of judicial power, but a reservation of jury power" (*id.*). Moreover, the majority disputed the claim that *Apprendi* was unfair to criminal defendants or that it undermined adversarial fact finding. In any event, the majority emphasized that the decision could not turn on matters of efficiency or fairness, but on preserving the Framers' "paradigm for criminal justice", which included the "common law ideal of limited state power accomplished by strict division of authority between judge and jury" (*id.*, at 2543). Finally, as the majority declared:

> "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters alternative, he has no such right. That should be the end of the matter" (*id.*, at 2543).[1]

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1. The *Blakely* Court did not discuss whether the Fifth Amendment was implicated in this type of case, perhaps because the Fourteenth Amendment has not been held to include the Fifth Amendment's right to presentment or indictment of a Grand Jury. *Jones v United States*, 526 U.S. 227 (1999), a precursor to

(Cont'd)

Significantly, while the *Blakely* majority did not expressly address the applicability of the ruling to the Federal Sentencing Guidelines (*id.*, at 2538 n.9), the dissenters were of the view that *Blakely's* underlying reasoning cast serious doubt on the constitutional viability of the Guidelines, or at least the procedures in which they are used. Justice O'Connor wrote:

> "The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges it will cost you -- dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing reform. *It is thus of little moment that the majority does not expressly declare schemes unconstitutional* * * *, for as residents of '*Apprendi*-land' are fond of saying, 'the relevant inquiry is not one of form, but of effect.'" (*id.*, at 2543; emphasis added).

Later, in her dissent, Justice O'Connor added:

> "The consequences of today's decision will be as far reaching as they are disturbing. Washington's

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(Cont'd)
Apprendi, makes clear that, to impose the maximum penalty for a crime, the elements supporting that crime must be alleged in the indictment. Thus, in a case involving a federal conviction, the Fifth Amendment may well provide an additional rationale for the *Blakely* decision.

> sentencing system is by no means unique. Numerous other states have enacted guidelines systems, as has the Federal Government. * * * Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases criminally pending on direct appeal is in jeopardy" (*id.*, at 2549).

Elsewhere Justice O'Connor warned that,

> "[i]t is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines * * * *The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency normally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law* * * * and Congress has unfettered control to reject or accept any particularly guidelines" (*id.*).

In addition, Justice O'Connor denied that the structure of the Federal Sentencing Guidelines provided any grounds for distinction, since Washington's scheme was almost "identical to the upward departure regime established by 18 U.S.C. § 3553(b) and implemented in USSG § 5K2.0" (*id.*). If anything, Justice O'Connor wrote, the Federal Guidelines were even more vulnerable to attack (*id.*). And the other dissents similarly predicted that the Federal sentencing scheme would be affected.

In the wake of *Blakely*, many commentators have similarly predicted that the decision will radically affect, if not doom, the Federal sentencing system. That is because typically in the Federal system, a defendant's sentence is significantly increased on the basis of facts not specified in the indictment, not charged to the jury, not admitted during the plea allocution, and found only by a judge after the conviction, by a preponderance of the evidence. Indeed this is precisely what happened to Petitioner when, after the jury found him guilty of conspiracy to commit mail fraud and wire fraud conspiracy, and several counts of mail fraud, Petitioner's offense level was increased sixteen levels (twelve for the amount of loss, and four based on Petitioner's purported role in the offense) to a level twenty-six. Of course the counts charging Petitioner did not identify the loss nor the role he allegedly played in the charged offenses, nor was the jury instructed that, to find Petitioner guilty of the charged offenses, the alleged loss and role constituted elements of the offense which the jury had to find beyond a reasonable doubt.

Thus, Petitioner's case presents an early opportunity to resolve whether, and to what extent, *Blakely* applies to the Federal Sentencing Guidelines. As Justice Breyer noted in dissent, this type of clarification is essential:

> "Consider some of the matters that federal prosecutors must know about, or guess about, when they prosecute their next case: (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as 'elements' of the crime? (3) What, then, are the evidentiary rules? * * * Are the numerous

> cases of this Court holding that a sentencing judge may consider virtually any reliable information still good law when juries, not judges are required to determine the matter? * * * (4) How are juries to deal with highly complex or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge?
>
> Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised" (*id.*, at 2561-62).

Granting review of this case, therefore, will enable this Court to address the serious questions raised by the *Blakely* dissenters, and eliminate much of the current uncertainty engendered by *Blakeley*.

CONCLUSION

THE PETITION SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 21, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03-1141

UNITED STATES OF AMERICA,

Appellee,

v.

NUMISGROUP INTERNATIONAL CORP., Numismatic Asset Strategies, Inc., Galerie Des Numismatique Ltd, Meridian Numismatics, Inc. and Robert Dupurton,

Defendants-Appellants,

John Laura, Angelina Caltagirone, Robert Smith, Tom Paull, Nick Ferraro and Calvin Richard,

Defendants.

Argued: May 18, 2004

Decided: May 21, 2004

Before: Miner, Katzmann, *Circuit Judges*, Tsoucalas, *Judge*.*

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* The Honorable Nicholas Tsoucalas, of the United States Court of International Trade, sitting by designation.

Appendix

PER CURIAM.

This case involves the question of whether the presence of objective and subjective grading factors immunizes a seller of coins from a criminal charge of fraudulently misrepresenting the grade and value of coins to purchasers. While noting the existence of a number of objective, established grading factors, the district court determined that the Government had sufficiently shown, beyond a reasonable doubt, "that while subjectivity in the grading process may justify some variation in grading, this subjectivity factor cannot account for the huge differential in the grading and value of the coins." *United States v. Numisgroup Int'l, Corp.*, 170 F. Supp. 2d 340, 351 (E.D.N.Y. 2001). The Court concluded that a reasonable jury could have found the essential elements of mail fraud based on the intentional, systematic overgrading, beyond a reasonable doubt.

We AFFIRM the judgment of the District Court for substantially the reasons stated by the District Court in its thorough decision, *see id.*, 170 F. Supp. 2d 340 (E.D.N.Y. 2001).